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17 UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

19 NATIONAL URBAN LEAGUE, et al.,

20 Plaintiffs,

21 v.

22 WILBUR L. ROSS, JR., et al.,

23 Defendants.

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CASE NO. 5:20-cv-05799-LHK

**PLAINTIFFS' RESPONSE TO ORDER
RE: BRIEFING AND DEADLINE FOR
PRODUCTION**

Date: TBD
Time: TBD
Place: Courtroom 8
Judge: Hon. Lucy H. Koh

1 Plaintiffs respectfully respond to the two questions raised in the Court's September 12,
 2 2020 Order re: Briefing and Deadline for Production (ECF No. 101) ("Order").

3 **I. THE COURT HAS DISCRETION TO REVIEW ADMINISTRATIVE RECORD
 4 PRIVILEGE LOG DOCUMENTS *IN CAMERA* AND SHOULD EXERCISE
 THAT DISCRETION HERE**

5 As a general matter, "in camera review is a highly appropriate and useful means of dealing
 6 with claims of governmental privilege." *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 405-06 (1976).
 7 District courts in the Ninth Circuit regularly exercise their discretion to conduct *in camera* review
 8 when assessing deliberative process privilege in an administrative record ("AR") context. *See,*
 9 *e.g., In re United States*, 875 F.3d 1200, 1210 (9th Cir. 2017) (explaining "many district courts
 10 within this circuit have required a privilege log and *in camera* analysis of assertedly deliberative
 materials in APA cases," and finding no clear error on mandamus review), *vacated on other*
 11 *grounds by*, 138 S. Ct. 443 (2017); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*,
 12 2007 WL 3049869, at *6 (N.D. Cal. Oct. 18, 2007) (conducting AR *in camera* privilege review);
 13 *Trout Unlimited v. Lohn*, 2006 WL 1207901, at *5 (W.D. Wash. May 4, 2006) (same);
 14 *Fisherman's Finest, Inc. v. Gutierrez*, 2008 WL 2782909, at *5 (W.D. Wash. July 15, 2008)
 15 (same).¹

16 The government has the burden to justify any deliberative process privilege assertions. *N.*
Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003). To do so, the
 18 government must provide: "(1) a formal claim of privilege by the head of the department
 19 possessing control over the requested information, (2) an assertion of the privilege based on actual
 20 personal consideration by that official, and (3) a detailed specification of the information for which
 21 the privilege is claimed, along with an explanation of why it properly falls within the scope of the
 22 privilege." *Coleman v. Schwarzenegger*, 2008 WL 2237046, at *4 (E.D. Cal. May 29, 2008)
 23 (citation omitted); *see City of Laguna Niguel v. FEMA*, 2009 WL 10687971, at *5 n.1 (C.D. Cal.
 24 Nov. 20, 2009) (same requirements in AR context). The privilege is very narrowly construed,

26 ¹In *United States v. Zolin*, 491 U.S. 554, 571-72 (1989), the Court considered whether *in camera*
 27 review was required in the context of the crime-fraud *exception* to the attorney-client privilege.
 28 In that distinct context, the Court held that the court must find a factual basis adequate to support
 a good faith belief that the review may reveal evidence to establish the applicability of the
 exception. That standard, which is itself not "stringent," is not applicable here.

1 applicable only to particular documents that are “predecisional” and “deliberative in nature.” *FTC*
 2 *v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *N. Pacifica*, 274 F. Supp. 2d at
 3 1122 (“[T]he [deliberative process] privilege is strictly confined within the narrowest possible
 4 limits consistent with the logic of its principles.”). The privilege does not apply to “factual
 5 material”; ultimate adoption by the agency obviates any claim of deliberative process privilege;
 6 and “[a] document that was prepared to support a decision already made is not predecisional.”²
 7 And the privilege is not absolute, meaning that even when properly invoked, it can be overcome by
 8 a sufficient showing of need outweighing any claimed harm. *Warner Commc’n*, 742 F. 2d at 1161.

9 Defendants fail to meet their burden here—they barely even try. They have filed no
 10 declaration by the head of the relevant department, and their only declarant (the Assistant General
 11 Counsel for Employment, Litigation, and Information) does not even claim to have personally
 12 reviewed or considered the purportedly privileged documents. Nor does their privilege log (Dkt.
 13 106, Att. 2) provide a detailed specification of the information for which the privilege is claimed,
 14 along with an explanation of why it properly falls within the scope of the privilege. *See Cal. Native*
 15 *Plant Soc’y v. EPA*, 251 F.R.D. 408, 413 (N.D. Cal. 2008) (“Conclusory statements that a document
 16 is deliberative do not suffice”); *Fishermen’s Finest*, 2008 WL 2782909, at *2 (need to “identify
 17 specific decision to which the document is predecisional”).

18 A brief review of just one portion of Defendants’ log is illustrative:

19	8/3/2020 13:39	Christopher Demo	operational and processing options to meet september 30 final.pdf	Predecisional and Deliberative	Document reflecting information provided to facilitate deliberative discussions internal briefing materials on proposed Department action/decision/policy.	Withheld in full
20	8/3/2020 13:39	Christopher Demo	operational and processing options to meet september 30 final.pdf	Predecisional and Deliberative	Document containing pre-decisional deliberations a draft report on proposed Department action/decision/policy.	Withheld in full
21	8/3/2020 13:39	Christopher Demo	operational and processing options to meet september 30 final.pdf	Predecisional and Deliberative	Document containing pre-decisional deliberations a draft report on proposed Department action/decision/policy.	Withheld in full
22	8/3/2020 13:39	Christopher Demo	operational and processing options to meet september 30 final.pdf	Predecisional and Deliberative	Document containing pre-decisional deliberations a draft report on proposed Department action/decision/policy.	Withheld in full
23	8/3/2020 15:56	Burris, Meghan (Federal)	Draft Census Statement	Predecisional and Deliberative	Email communication reflecting information provided to facilitate deliberative discussions a draft public statement on proposed Department action/decision/policy.	Withheld in full
24	8/3/2020 15:56	Ali Mohammad Ahmad (CENSUS/ADCOM FED)	FOR REVIEW- Draft Director Dillingham Statement_cd.docx	Predecisional and Deliberative	Draft document reflecting information provided to facilitate deliberative discussions a draft public statement on proposed Department action/decision/policy.	Withheld in full
25	8/4/2020 0:11	Ali Mohammad Ahmad (CENSUS/ADCOM FED)	Embargoed Till Posting- Statement from Director Dillingham on 2020 Census Updates.docx	Predecisional and Deliberative	Draft document containing pre-decisional deliberations a draft public statement on proposed Department action/decision/policy.	Withheld in full
26	8/4/2020 0:11	Ali Mohammad Ahmad (CENSUS/ADCOM FED)	Embargoed Till Posting- Statement from Director Dillingham on 2020 Census Updates.docx	Predecisional and Deliberative	Draft document containing pre-decisional deliberations a draft public statement on proposed Department action/decision/policy.	Withheld in full
27	9/10/2020 20:17	Ali Mohammad Ahmad (CENSUS/ADCOM FED)	FOR REVIEW- Draft Director Dillingham Statement (t).docx	Predecisional and Deliberative	Draft document containing pre-decisional deliberations a draft public statement on proposed Department action/decision/policy.	Withheld in full
28	9/10/2020 20:17	Ali Mohammad Ahmad (CENSUS/ADCOM FED)	FOR REVIEW- Draft Director Dillingham Statement (t).docx	Predecisional and Deliberative	Draft document containing pre-decisional deliberations a draft public statement on proposed Department action/decision/policy.	Withheld in full
29	9/10/2020 20:21	Christopher Demo	Operational and Processing Options to meet September 30 Final.pdf	Predecisional and Deliberative	Document containing pre-decisional deliberations a draft report on proposed Department action/decision/policy.	Withheld in full
30	9/10/2020 20:21	Christopher Demo	Operational and Processing Options to meet September 30 Final.pdf	Predecisional and Deliberative	Document containing pre-decisional deliberations a draft report on proposed Department action/decision/policy.	Withheld in full

² See *Dominguez v. Schwarzenegger*, 2010 WL 3341038, at *5 (N.D. Cal. Aug. 25, 2010); *Nat'l Res. Def. Council v. U.S. Dep’t of Defense*, 388 F. Supp. 2d 1086, 1098 (C.D. Cal. 2005); *Fisherman’s Finest*, 2008 WL 2782909, at *5 (W.D. Wash. July 15, 2008).

1 Dkt. 106. Here, among other things, Defendants claim “predecisional” deliberative privilege over
 2 various versions of the important August 3, 2020 “final.pdf” presentation that was first revealed by
 3 Congress and highlighted in Plaintiffs’ TRO—even though Defendants produced three other
 4 versions of that document (Dkt. 105-3 at DOC_0000870-910), even though they come after and
 5 reflect the July 29 decision to cut short census operations, and even though some versions of it
 6 (September 10, 2020) are dated long after even the August 3 press release. Plaintiffs respectfully
 7 submit that this log affirmatively shows that many of the claimed privileged documents are nothing
 8 of the sort. *In camera* review “is not a substitute for the government’s burden of proof.” *Coleman*,
 9 2008 WL 2237046, at *3. The Court should accordingly order production of the vast majority of
 10 these documents now. But at a minimum, the Court should conduct an *in camera* review.

11 **II. THE COURT MAY EXTEND THE TRO FOR A BRIEF TIME WHILE
 12 CONSIDERING THE MOTION FOR PRELIMINARY INJUNCTION**

13 “[T]here is no time limit or other requirements clearly set in the Federal Rules for the court
 14 to set the hearing on the motion for preliminary injunction where,” as here, “the TRO was issued
 15 *with notice.*” *Fid. Brokerage Servs. LLC v. Rocine*, 2017 WL 3917216, at *6 (N.D. Cal. Sept. 7,
 16 2017); *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 868 n.23 (N.D. Cal. 2018).
 17 Whatever the outer limits, the Court clearly has ample discretion to follow the rules that govern *ex
 18 parte* motions. That is, the Court may extend “for good cause” and “for a like period” (here, up to
 19 an additional 12 days). Fed. R. Civ. P. 65(b)(2).

20 Here, the record demonstrates good cause to extend the TRO for two independent reasons.
 21 *First*, good cause exists because Defendants have not complied with the Court’s order requiring
 22 production of the AR in this case. Dkt. 96. Due to space and time constraints, Plaintiffs will
 23 highlight only a few of Defendants’ many failings in this respect:

- 24 • Defendants ignored the Court’s Order to provide the critical materials at the heart of
 this case: the “documents comprising the Replan and its various components for
 conducting the 2020 Census in a shortened time period.” Dkt. 96 at 21.
- 25 • Defendants unilaterally decided they would stop reviewing and producing AR
 materials at approximately 11:00 AM on Sunday, September 13, rather than use the
 full day to comply with the Order. Notice 1 (Dkt. 104).
- 26 • Defendants’ collection efforts involved only a half-hearted attempt to identify
 relevant documents from the Bureau Director and Deputy Director. *See* DiGiacomo

1 Decl. ¶ 5 (acknowledging that, unlike approach to the Department of Commerce, no
 2 search terms were used to identify potentially responsive Bureau documents).

- 3 • Defendants failed to produce materials from their *own* recent production to the OIG
 4 covering largely identical issues. On August 13, 2020, the OIG sought essentially the
 5 same documents ordered by this Court, and gave Defendants **4 days** to comply. *See Annex A.* Defendants did so, as Mr. Fontenot attests. Fontenot Decl. ¶ 103. But to
 6 this Court, Defendants simply say they are still “reviewing” this already-identified set
 7 of critical, responsive materials. DiGiacomo Decl. ¶ 5.b.

8 These problems are readily evidenced by Defendants’ non-production production: a total of
 9 72 documents, comprised almost entirely of (1) the 2018 Operational Plan (which everyone has,
 10 and covers approximately 23% of the total pages of the production); (2) a series of “Reports” on
 11 census operations which begin in April 13 and end on July 27; (3) a set of emails almost entirely
 12 redacted for alleged deliberate process privilege; and (4) a few versions of the August 3
 13 presentation previously revealed by Congress. Defendants themselves admit their production is
 14 neither complete nor compliant with this Court’s order. DiGiacomo Decl. ¶ 11.

15 Second, good cause exists if the Court needs “more time” to “fully . . . consider the parties’
 16 arguments and motions.” *Costa v. Bazron*, 2020 WL 2410502, at *2 (D.D.C. May 11, 2020)
 17 (extending TRO “because parties need time to brief, and the Court needs time to consider” PI
 18 motion); *see Castellanos v. Countrywide Bank NA*, 2015 WL 914436, at *3 (N.D. Cal. Feb. 27,
 19 2015); *SEC v. AriseBank*, 2018 WL 10419828, at *1 (N.D. Tex. Mar. 9, 2018). The parties have
 20 submitted extensive briefing and evidentiary submissions already; additional briefs, and
 21 (hopefully) a more robust AR, are still to come; and a PI hearing is currently scheduled for the day
 22 the TRO is set to expire.

23 These are independently sufficient reasons to find good cause and extend the TRO.
 24 Viewed together, extending the TRO for a short additional period so that Defendants can comply
 25 with the Court’s order would be eminently reasonable.

26 ///

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ATTESTATION

I, Anne Robinson, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: September 14, 2020

LATHAM & WATKINS LLP

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